

FAIR EMPLOYMENT & HOUSING COMMISSION

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MINUTES 469th COMMISSION MEETING

June 22, 2007
Office of Emergency Services
1300 Clay Street, Suite 400
Oakland, California

PRESENT:

Acting Vice Chair Tamiza Hockenhull, Commissioners Patrick Adams and Linda Ng; and Commission staff Ann Noel, Caroline Hunt, Regina Brown, Joseph Ragazzo, Denise Choye, Cynthia Jones and Loc D. Tra; Deputy Attorney Generals Nancy A. Beninati and Kathy Mikkelson; and Attorney General's Office legal intern Sharon Jacobs; and Department of Fair Employment and Housing (Department or DFEH) Acting Director Wanda Kirby

Commissioner Freeman participated telephonically from 2 Palo Alto Square, 3000 El Camino Real, Suite 700, Palo Alto.

Acting Vice Chair Hockenhull moved, Commissioner Adams seconded, and the Commission unanimously voted to call the meeting to order at 10:00 a.m. [07-15]

OPEN SESSION**REVIEW OF AGENDA**

Acting Vice Chair Hockenhull moved, Commissioner Ng seconded, and the Commission unanimously accepted the agenda. [07-16]

REVIEW OF THE MINUTES

Acting Vice Chair Hockenhull moved, Commissioner Ng seconded, and the Commission unanimously voted to adopt the Minutes and Transactions of the 468th meeting as submitted. [07-17]

COMMISSIONERS' REPORTS

Acting Vice Chair Hockenhull reported that both she and Executive and Legal Affairs Secretary (ELAS) Noel had a successful meeting with the California African American Museum

(CAAM) in Los Angeles, where they discussed the 50 anniversary celebration for the signing of the Fair Employment and Housing Act with the possibility of having part of the celebration take place at CAAM in 2009. Acting Vice Chair Hockenhull added that ELAS Noel will elaborate further on the meeting in her report.

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING'S REPORT

DFEH Acting Director Kirby reported on the Department's three successful Budget Change Proposals (BCP) for the current fiscal year: to relocate the Department's Los Angeles district offices; to establish a third housing unit, where seven permanent consultants have been hired; and, to hire additional attorneys and staff at the Department's headquarters in Elk Grove.

Janie Siess, the Department's Deputy Director of Program Policy, has revised the Department's Case Analysis Manual, a document that was originally created in 1983 to assist Department attorneys and consultants to investigate cases. The Department hopes to release five chapters from the Manual in the next few weeks. These chapters will cover disability, medical condition, sexual harassment, the California Family Rights Act, and religion. The Department will provide the Commission with copies of the Manual. Eventually the Manual will be made available on the Department's website.

Terry Fee, a former DFEH attorney on loan from the Employment Development Department, has provided Department staff with training on the law using the new Manual.

The Equal Employment Opportunity Commission (EEOC) had also trained Department staff on employment law basics. Beginning this July and August, the EEOC will train Department staff statewide on "national origin" and "religious discrimination" law.

Acting Vice Chair Hockenhull thanked Kirby for her report and stated that she would like for the guests at the meeting to identify themselves for the record. ELAS Noel agreed and added that it was especially helpful for Commissioner Freeman who was participating telephonically.

Commissioner Freeman asked Kirby why former DFEH Director Suzanne Ambrose's biography is still on the DFEH's website. Kirby replied that she is currently serving in an acting capacity and has not expressed interest in the position. However, Kirby has met with the State and Consumer Services Agency (SCSA or Agency) Secretary Rosario Marin and was encouraged that an announcement will be made shortly regarding a new Department Director. Commissioner Freeman stated that if Ambrose's biography continues to stay on DFEH's website it might be confusing to the public, to which Kirby indicated that she receives all of Ambrose's correspondence.

ELAS Noel introduced the Commission staff: Administrative Law Judges (ALJ) Caroline L. Hunt, Regina Brown and Joseph Ragazzo; Office Administrator Denise Choye; Legal Secretary Cynthia Jones and Executive Assistant Loc D. Tra and gave a description of each staff's duties and functions within the Commission. ELAS Noel also introduced Deputy Attorney Generals (DAG) Kathy Mikkelson and Nancy Benianti and legal intern Sharon Jacobs.

ATTORNEY GENERAL'S REPORT

DAG Beninati reported on three cases from the Civil Rights Enforcement Section of the Attorney General's office.

Chamber of Commerce of the United States v. Lockyer, a declaratory and injunctive relief action, to declare a California law, AB 1889, unconstitutional. AB 1889 prohibits employers who are recipients of state funds from using them to support or oppose unionization. The Ninth Circuit, in an *en banc* decision (twelve to three opinion), held that certain Government Code provisions are not preempted by the National Labor Relations Act and therefore do not infringe on employers' First Amendment rights. The Chamber has filed a writ of certiorari with the United States Supreme Court. The AG's briefing has been completed but on April 13, 2007, the U.S. Supreme Court issued an order inviting the U.S. Solicitor General to file a brief expressing its view on whether the petition should be granted. DAG Angela Sierra is working on this case.

North Coast Women's Medical Group v. Superior Court, a private litigation suit under the Unruh Civil Rights Act. This case concerns a woman whose doctor refused her fertility treatment because of her sexual orientation. The doctor argued in its defense that under the First Amendment he has the right to refuse treatment based on his religious beliefs. The AG's office filed an amicus curiae brief on April 30, 2007. The AG argued that the Free Exercise Clause of Article 1, Section 4 of the California Constitution does not excuse a person from complying with a neutral law of general application which is the Unruh Act. The AG argued that even if a person asserts a religious belief that conflicts with the law, the person must still obey the law.

DFEH v. 1105 Alta Loma Road Apartment, the Department filed a lawsuit against a landlord who refused to grant a tenant reasonable accommodation under a local ordinance and the Ellis Act, which automatically extends the tenancy of a single person for one year if the landlord removes the rent-controlled property from the market. The landlord filed an Anti-Slapp motion against the Department claiming that the Department filed the lawsuit trying only to quash the landlord's right to petition the court and his rights of free speech. The AG's brief is due June 26, 2007.

EXECUTIVE AND LEGAL AFFAIRS SECRETARY'S (ELAS) ACTIVITY REPORT

ELAS Noel discussed the following items from her Report:

Commission Confirmation: Chairman George Woolverton was approved by the State Senate on May 14, 2007. The Commission had extended its congratulations to Chairman Woolverton.

2007-08 and 2008-09 Budgets: The Legislature has approved a \$20,000 augmentation for Commission travel expenses and pay that will go into effect for the 2007-08 budget year.

Adjudication and Settlement Conferences: Since January 2007, the Department has issued 48 accusations in this calendar year and for the fiscal year it has issued over 100. In the calendar year 2007, the Commission ALJs presided over 25 days of contested hearings in addition to telephonic case management conferences, settlement conferences, law and motion matters, and other related matters.

Outreach and Public Speaking: On behalf of the Commission, ELAS Noel spoke at three Continuing Education of the Bar seminars about the Commission's sexual harassment training regulations and disability laws in San Francisco, Los Angeles, and Orange County. Originally Chairman Woolverton was scheduled to participate at these seminars. ELAS Noel also participated in two Brightline Compliance webinars, an online training organization, discussing the progress of the Commission's sexual harassment proposed regulations in the regulatory process. ELAS Noel anticipated that once the Commission's proposed regulations have been approved and finalized both she and Commission ALJs will speak more to discuss the regulations.

Commissioner Adams asked ELAS Noel to give more information about Brightline Compliance, to which she replied that it is an East Coast company that provides training for employers, most specifically their Human Resources managers, on how to comply with various civil rights employment laws and other states laws, nationally.

ELAS Noel also spoke to the California Teachers Association's Civil Rights and Education subcommittee on the areas of the Fair Employment and Housing Act that especially affect teachers.

Commissioner Appointments: The Commission will have one additional vacancy, due to Vice Chair Herschel Rosenthal's term expiring on September 18, 2007 and ELAS Noel has not heard from either the Governor's office or SCSA of the possible two replacements. In addition, Commissioners Adams and Ng's terms expire on September 18 and they may then seek reappointment.

Mandatory Relocation: In May 2007, SCSA told the Commission that it would need to relocate its office and staff from San Francisco to Sacramento. The Commission discussed the move and its impact on Commission functions and agreed to seek further information from Agency Secretary Marin.

Commissioner Adams moved, Commissioner Hockenhull seconded, and the Commission voted 4:0 to contact SCSA and request that the meeting on June 25, 2007 be postponed until the Commission has had the opportunity to be verbally briefed directly by Agency on the reasons for the move. [07-18] The Commission asked ELAS Noel not to attend the June 25, 2007 meeting until after the Commissioners had been briefed by Agency.

Depending on the outcome of the move and whether the Commission retains its staffing after the move, the Commission would like to perform the following two long range public service objectives.

1. Create a program, once the Commission's Sexual Harassment and Training regulations are approved, to provide training (webinars, etc.) statewide talking about the regulations' requirements for AB 1825 – compliant sexual harassment trainings.

2. Provide training to employers and employees on the varying kinds of leaves an employee can take. In California, an employee can take, among others, Pregnancy Disability leave, California Family Rights Act leave, Paid Family leave, Worker's Compensation leave, and Kin Care leave, among others. These leaves are administered by multiple state agencies, such as the Department, Employment Development Department and Department of Industrial Relations. Hence, employers' obligations and employees' rights to take these leaves are confusing. Furthermore, Commissioner Freeman and ELAS Noel would like to have the Commission sponsor a conference on how to comply with the law and various types of leaves.

50th ANNIVERSARY PLANNING

ELAS Noel discussed the Commission's plans for the 50 anniversary celebration of the enactment of the Fair Employment and Housing Act (FEHA) and whether staffing for the event will be effected by the mandatory relocation.

ELAS Noel summarized the 40th anniversary celebration document authored by Wanda Kirby and stated that the document for the 50th anniversary will be similar.

ELAS Noel and Acting Vice Chair Hockenhull met with California African American Museum's (CAAM) Executive Director, Charmayne Jefferson to discuss putting together an exhibit for the anniversary. CAAM and Jefferson are excited to be involved in the celebration.

ELAS Noel has held off on contacting the Labor and Employment Section of the State Bar (L&E) waiting to see what happens with the mandatory relocation.

LEGISLATION

ALJ Ragazzo reported that the FEHC's Legislative Committee, Commissioners Adams and Ng and Judge Ragazzo, met in April to discuss ideas for possible legislative bills that the Commission could sponsor in the next legislative session. The Committee discussed how fines and damages are applied in Commission cases and discussed creating standards that the Commission could use to make such awards. The Committee also discussed sponsoring legislation to redirect money collected for administrative fines, which now goes to the state's General Fund, and instead, provide that this money be given as grants to non-profits to work against discrimination or for outreach and education. The Committee plans to meet again before the next Commission meeting to further explore these ideas.

Judge Ragazzo referred the Commission to his legislative report for information about current legislative bills being tracked by the Commission. Judge Ragazzo discussed the status of two bills the Commission has tracked: S.B. 122 (Sen. Steinberg), which would have added homelessness to the categories protected by California's hate violence statutes; and A.B. 1501 (Asm. Niello), which

would have eliminated the requirement that online sexual harassment training for California's supervisors take at least two hours to be considered AB 1825-compliant. These two bills have not passed out of their first policy committees and thus they appear unlikely to pass in this legislative session.

HARASSMENT TRAINING REGULATIONS

ELAS Noel reported that FEHC staff has submitted the Commission's Sexual Harassment Training regulatory package to the Office of Administrative Law (OAL) for its review on June 5, 2007. Prior to this, staff had worked with OAL staff for several weeks on an informal evaluation of the Commission's regulations to make the final review as smooth as possible. OAL has until July 18, 2007, which is 30 working days for the initial date of submission, to render its decision either to approve or disapprove the Commission's regulations. Once approved, the regulations are forwarded to the Secretary of State's office where they become effective 30 days thereafter.

ELAS Noel reiterated that at the April 23, 2007, FEHC meeting Chairman Woolverton suggested that at the upcoming August 7, 2007, San Diego meeting, the Commission could revisit some of the policy decisions made about the Commission's regulations. As such, this item will remain on the agenda for Chairman Woolverton to revisit at the August 7, 2007 meeting.

PUBLIC COMMENTS

Acting Vice Chair Hockenhull asked the members of the public present if anyone wished to speak or comment on what they had heard in the meeting thus far. None wished to speak.

The Commission took a ten minute recess at 11:30 a.m.

ALJ Ragazzo left the meeting.

CLOSED SESSION

The Commission entered Closed Session at 11:40 a.m.

Only the Acting Vice Chair, Commissioners (Commissioner Freeman participated telephonically), Commission staff, and Attorney General staff were present.

The Commission discussed writs, hearings and litigation and deliberated on pending cases.

a. Writs and Appeals

(1) DFEH v. San Francisco BART (Bartley)

ELAS Noel reported that the respondent BART has filed its opening brief supporting

its writ of administrative mandamus. DAG Mikkelson will file the Commission's opening brief July 2nd and a reply brief by respondent BART is due July 13. The Alameda Superior Court will hear this writ on July 27, 2007.

(2) DFEH v. Prunty's New Beginnings (Project Sentinel/Jensen)

DAG Beninati reported that the AG's office is representing the Department in enforcing the Commission's judgment. The complainant, Project Sentinel might file a writ challenging the Commission's attorney's fee award.

b. Post-Decision

The Commission monitors its post-decisions to ensure its orders are enforced and monetary awards are paid. ELAS Noel noted that the AG's office has been efficient in reducing Commission decisions to judgments and the Department has been diligent in collecting judgments in most cases.

ELAS Noel presented the following three post-decision status reports.

(1) DFEH v. CATERON, et al (Benjamin)

To date, there has been no enforcement in this case. Neither ELAS Noel nor DAG Beninati was sure that this decision's order has been reduced to judgment.

(2) DFEH v. Capitol Hills AM/PM (Johnson)

The AG's office is seeking a judgment in the case and the Department hopes to collect monetary damages.

(3) DFEH v. San Diego City Event (Handevitdt)

The respondent San Diego City Event is in bankruptcy, with the Internal Revenue Service, as first creditor expected to collect the respondent's entire remaining assets.

ALJ Hunt left the room at 11:50 a.m. and ELAS Noel presented the following case.

c. Administrative Adjudication: Pending Decisions

(1) DFEH v. Sasco Electric (Sherl)

Commissioner Ng moved, Commissioner Adams seconded, and the Commission voted 4:0 to adopt the proposed decision. [07-19]

Commissioner Adams moved, Commissioner Hockenhull seconded, and the Commission voted 3:1 to make the proposed decision precedential. Commissioner Freeman abstained. [07-20]

ALJ Brown presented the following case.

(2) DFEH v. Hardin Automotive (Andrade)

Acting Vice Chair Hockenhull moved, Commissioner Adams seconded, and the Commission voted 4:0 to adopt the proposed decision and amend and reduce the emotional distress damages from \$55,000 to \$25,000. [07-21]

ALJ Brown left the room and ALJ Hunt rejoined the meeting at 12:30 p.m. and presented the following case.

(3) DFEH v. Harry Mayo (Young)

Acting Vice Chair Hockenhull moved, Commissioner Ng seconded, and the Commission voted 4:0 to adopt the proposed decision. [07-22]

Acting Vice Chair Hockenhull moved, Commissioner Adams seconded, and the Commission unanimously voted to end Closed Session at 12:40 p.m. [07-23]

ADJOURNMENT

The Commission adjourned its meeting and the forum at 12:40 p.m.

Date: June 22, 2007

TAMIZA HOCKENHULL
Acting Vice Chair

ANN M. NOEL
Executive and Legal Affairs Secretary

**REPORT OF TRANSACTIONS
OF THE 469th COMMISSION MEETING
June 22, 2007
Oakland , California**

THE COMMISSION AT THIS MEETING TOOK THE FOLLOWING ACTIONS:

- 07-15 Approved calling the meeting to order.
- 07-16 Approved the meeting's agenda.
- 07-17 Approved the Minutes and Transactions of the 468th meeting.
- 07-18 Voted 4:0 to contact SCSA and request that the meeting on June 25, 2007 be postponed until the Commission has had the opportunity to be verbally briefed directly by Agency on the reasons for the move.
- 07-19 Voted 4:0 to adopt the proposed decision in DFEH v. Sasco Electric (Sherl).
- 07-20 Voted 3:1 to make the proposed decision precedential. Commissioner Freeman abstained.
- 07-21 Voted 4:0 to adopt the proposed decision and amend and reduce the emotional distress damages from \$55,000 to \$25,000 in DFEH v. Hardin Automotive (Andrade).
- 07-22 Voted 4:0 to adopt the proposed decision in DFEH v. Harry Mayo (Young).
- 07-23 Approved ending Closed Session and adjourning the meeting.

Prepared By

Loc D. Tra
Clerk of the Commission